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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1222

S. H. LYNCH & CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. B 1-3) is not yet officially reported. The Board's supplemental decision and order (Pet. App. B 4-45) are reported at 171 NLRB No. 167. The earlier *per curiam* opinion of the court of appeals (Pet. App. C 1) is reported at 377 F. 2d 558, and the Board's initial decision and order (Pet. App. C 2-11) appear at 160 NLRB 113.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1969, and a petition for rehearing was denied on February 27, 1969 (Pet. App. A 1-3). The petition for a writ of certiorari was filed on April 2, 1969, invoking this Court's jurisdiction under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board, following a hearing ordered by the court of appeals, properly found, on the basis of substantial evidence on the record as a whole, that union electioneering had not tainted a representation election.

STATUTE INVOLVED

The National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), provides in part:

> Sec. 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

1. *The Initial Proceedings.* On November 19, 1965, a representation election was held under the Board's aegis, and the petitioner company's employees voted

in favor of the union [1] by secret ballot, 38 to 22 (R. 27).[2] The company filed objections to the election (R. 29-35), alleging that certain statements made in a leaflet issued by the union to the employees one week prior to the election: (1) understated wage rates of the company's own employees; (2) overstated commissions received by union employees at competitors' plants in Houston; and (3) erroneously compared insurance benefits at the company's plant with those received by employees working in Houston under a union contract.

Pursuant to the Board's Rules and Regulations,[3] the Regional Director conducted an administrative investigation and concluded that the objections did not warrant setting the election aside (R. 37-43). The Board sustained the Regional Director and certified the union as the exclusive bargaining representative for the company's employees (R. 80-82).

Thereafter, "in order to obtain judicial review" of the Board's actions in the representation proceeding (R. 100), the company refused to bargain. The ensuing unfair labor practice proceeding culminated in a Board order requiring the company to honor the Board's certification of the union (R. 103-107).

On review of the Board's order, the court of appeals, in a brief *per curiam* opinion citing its earlier

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[1] International Union of United Brewery, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO.

[2] "R" refers to the Printed Record in the initial proceeding in the court below; "A" refers to the Joint Appendix to the briefs in the present proceeding in the court below.

[3] Section 102.69(c), 29 C.F.R. 102.69(c).

decision in *U. S. Rubber Co.* v. *National Labor Relations Board*, 373 F. 2d 602, remanded the case to the Board for a hearing on the company's objections to the election (Pet. App. C 1).

2. *The Present Proceedings.* Based upon the evidence adduced at the hearing on remand, the Board made the following findings of fact:

On November 12, 1965, one week before the election, the union mailed a leaflet to each employee in the bargaining unit, contrasting the wages and insurance benefits afforded the company's employees in Dallas with those provided under the union's contract with several beer distributors in Houston (A. 19-20, 121-122). The leaflet stated that "helpers" under the Houston contract received a commission of 4½ cents per case of beer, and that the insurance of the Houston employees is "All paid for by the Company" whereas the company's policy in Dallas "costs you as much as $11.50 a month." At the end of the leaflet was a notification that the union's next meeting would be held on November 18 (A. 122).

On the morning of November 17, the leaflet was brought to the attention of the company's secretary-treasurer. He compared it with a copy of the Houston contract and discovered that the leaflet overstated the commission of helpers under the Houston contract by 2½ cents per case and understated the wages and commission paid to the company's own "bottle route" drivers. He also determined that the insurance benefits received by company employees were greater than those received by the unionized Houston workers (A. 21; 67-77). At approximately 11:00 A.M., he brought

this information to the attention of the company's president (A. 77, 82-83). Although none of the drivers had yet checked in for the day (A. 80), the company made no attempt to inform them of the discrepancies it had found in the leaflet when they did (A. 83).

The next morning, the company's president and secretary-treasurer, after consulting with counsel, concluded that "it was too late to effectively communicate with anybody" (A. 22; 84). That afternoon, at a previously scheduled pre-election conference convened by a Board agent, company counsel questioned the union representative about the leaflet. The union representative, after consulting the Houston contract, admitted that the leaflet was in error, and that the commission received by both the company's helpers and those covered by the Houston contract was 2 cents per case. The union representative suggested that the union and the company jointly draft and issue a leaflet correcting the error (A. 23; 91-93, 98). After conferring privately with company representatives, however, company counsel announced that the company had not "had a chance to fully assess [its] position"; that it was not going "to waive any of [its] rights"; and that it "did not think a letter or a telegram or a leaflet, for that matter, would be effective at this date" (A. 23; 91). Accordingly, the company "turned down the idea of entering into a joint correction" (A. 93).[4]

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[4] The union representative also suggested that the election be postponed so that the employees could be apprised of the

Immediately thereafter, the union representative took steps to correct the errors regarding the helpers' commissions and weekly wages. At a union meeting that evening, attended by approximately 40 employees, or two-thirds of the unit (A. 4, 25; 100), he explained that the company had called his attention to an error in the union's leaflet and that the correct commission in Houston was 2 cents per case, rather than 4½ cents as stated in the leaflet (A. 25; 100-101). He also distributed another leaflet at the meeting, addressed to the company's employees and signed by him, which explained the error (A. 24; 98-101, 207). On the morning of the election, November 19, the union representative and six employees distributed the correcting leaflet to the employees as they entered the plant (A. 4, 25; 101). Each employee who passed through the gates received a copy of the leaflet unless he arrived before 6:00 A.M. (A. 101-102). At 7:00 A.M., when the election began, the handbilling ceased (A. 4, 25; 101).

Based upon the foregoing and the other evidence in the record, the Board reaffirmed its earlier conclusion that any errors in the union's pamphlet did not warrant setting aside the election. In reaching this conclusion, the Board explained that: (1) the union's understatement of the wage rates of the company's *own* employees was the type of misstatement which the voters were capable of evaluating and thus did not undermine their freedom of choice (Pet. App.

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inaccuracies in the leaflet. The company agreed, but the Regional Director declined to postpone the election solely to allow additional time to electioneer (R. 40).

B 6); (2) by its corrective announcement at the November 18 meeting and its leaflet distributions on November 18 and 19, the union had effectively dispelled any inaccurate impressions conveyed by the original overstatement of the Houston commissions and weekly wages (Pet. App. B 8); and (3) the union's statements with regard to the insurance coverage of the unionized Houston employees were in themselves truthful and did not mislead the company's employees into believing the Houston insurance benefits equalled those of the company (Pet. App. B 9). Only after reaching these conclusions did the Board find that, "[f]urthermore," the company had adequate time in which to answer the union's representations as to wage rates and insurance (Pet. B 9-10). The Board, therefore, again ordered the company to bargain with the union (Pet. B 13-15).

The court of appeals then determined that the Board's exercise of its responsibility for insuring the fairness of representation elections was supported by substantial evidence on the record as a whole, and enforcement of the bargaining order was granted (Pet. App. B 1-3). Rehearing and rehearing *en banc* were denied (Pet. App. A 3).

ARGUMENT

The question posed by petitioner (Pet. 2)—"whether the panel which heard the second appeal could, without reason, disregard the 'law of the case' established by the decision of the first panel and hold that the identical undisputed evidence was sufficient to support the very same finding by the Board"—is not

presented on this record. While the court on the first review did, as petitioner asserts (Pet. 6), "necessarily determine" that the mere passage of two days was not of itself sufficient to demonstrate as a matter of law that petitioner had squandered adequate time to reply, the court did not, as petitioner erroneously supposes, affirm the contrary proposition: that as a matter of law the two day interval *could not* have been sufficient. If it had so held, it would have ordered the election set aside. Rather, all the court decided on the first review was that the question should properly have been answered as a matter *of fact*, after an evidentiary hearing. This is confirmed by the first panel's sole reliance on *U. S. Rubber Co.* v. *National Labor Relations Board*, 373 F. 2d 602 (C.A. 5), where a hearing was directed in a similar situation.

Accordingly, when the case returned to the court of appeals, following a hearing and the Board's reaffirmation of the ultimate conclusion originally reached, the second panel of the court was free—and indeed compelled—to make an independent review of the merits of the Board's decision in light of the newly developed full evidentiary record. This conclusion is buttressed by the fact that no circuit judge, including members of the original panel, requested a poll on the possibility of rehearing the second decision *en banc* to resolve the alleged failure to follow the "law of the case". See Pet. App. A 3.

Contrary to petitioner's assertion (Pet. 8-9), the Board did *not* rest its supplemental decision solely on

a finding that petitioner had possessed an adequate opportunity to reply to the pamphlet. The Board made this permissible factual finding only after concluding that any misstatements that might otherwise have had some untoward effect had been adequately corrected, and any taint dissipated, by the union's corrective conduct immediately before the election. Indeed, the court below noted that the Board's finding of adequate time to respond was only "among other things" the basis for its ultimate decision that the election was fair (Pet. App. B 2). The only question really presented, therefore, is whether on this record the Board had a reasonable basis for concluding that the misstatements in the union's November 12 pamphlet had not interfered with employee free choice in the election. There is no need for this Court to undertake further review of the evidentiary support in the record as a whole for the Board's decision on this point, unanimously upheld below. See *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502-503.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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